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IN THE

Supreme Court of the United States

October Term 1971

No. 71-236

DALTON CARL SMITH,

Petitioner.

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

DALTON CARL SMITH,

Petitioner.

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Dalton Carl Smith, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in this proceeding on July 20, 1971.

Opinions Below.

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, p. 1.

A copy of the District Court Judgment and Commitment, filed on March 1, 1971, appears at Appendix B, *infra*, p. 2.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 20, 1971. See Appendix A, p. 1, *infra*. This petition for certiorari was filed less than 30 days from the aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the *Bruton* rule and the Sixth Amendment right of confrontation are violated by admission into evidence of extra-judicial statements of alleged co-conspirators not available for cross-examination.

2. Whether the procedure of the trial court in admitting and permitting the jury to hear the extra-judicial statements of alleged co-conspirators *prior* to the Government's proving, at least *prima facie*, the existence of a conspiracy, violated Petitioner's right to Due Process under the Fifth Amendment.

3. Whether the failure of the trial court to order the Government to produce the minutes of the prior Grand Jury testimony of the witness Jerry Millican, after repeated requests by the defense that the said minutes be produced, violated the Jencks Act, 18 U.S.C. 3500, and constituted reversible error.

4. Whether the failure of the trial court to give Petitioner's counsel reasonable time to examine the material produced pursuant to 18 U.S.C. 3500 and to properly prepare for its use, constituted reversible error.

5. Whether various errors occurred at trial which prejudiced Petitioner's right to a fair trial, as well as his right to Due Process under the Fifth Amendment:

   A. Whether there was inflammatory and prejudicial conduct by the Government.

   B. Whether there was bias and hostility exhibited by the trial court.

   C. Whether there was insufficient competent evidence to sustain Petitioner's judgment of conviction.

Constitutional and Statutory Provisions Involved.

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Section 3500, Title 18 of the United States Code (Jencks Act):

"DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

"(b) After witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excise, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial."

"(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall

proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

* * *

"(3) a statement, however, taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

Statement of the Case.

In September of 1970 Petitioner Dalton Carl Smith, Emil Tucker, Leo Meyer Ogul and Maurice Medlevine were indicted by the Federal Grand Jury for the Central District of California for: conspiracy, interstate transportation of stolen and forged securities and the receiving and sale of stolen and forged securities in violation of Title 18 U.S.C. §§ 371, 2314, and 2315.

Jury trial of Petitioner Smith and co-defendant Tucker was commenced on January 5, 1971 before the Honorable Manuel L. Real, United States District Judge Presiding. Petitioner was found guilty on eighteen of the nineteen counts charged, while co-defendant Tucker was found guilty of all nineteen counts charged. Petitioner was sentenced to the maximum period prescribed by law and for a 90 day study under the provisions of 18 U.S.C. § 4208(b). Petitioner was released on bail pending appeal on condition that he file an expedited appeal.

On March 1, 1971 Petitioner filed a Notice of Appeal from the Judgment of Conviction and thereafter prosecuted an expedited appeal.

In a *per curiam* opinion, the United States Court of Appeals for the Ninth Circuit, on July 20, 1971 affirmed Petitioner's judgment of conviction (Appendix A, *infra*, p. 1.)

Statement of Facts.

The facts relevant to the questions presented by this Petition are as follows:

One Glen Harding Fildes had in his possession certain stock certificates some of which were in the names of himself, his mother and his brother. Said stock certificates were issued from four companies, among them Coca Cola Bottling of Los Angeles. After Fildes' death, on September 21, 1968, a search was conduct of his house, car and effects in Alhambra, California in an attempt to locate the said stock certificates. None were found.

On September 27, 1968 Jerry Millican, an attorney, was registered at the Palmer House in Chicago, Illinois. Petitioner Smith introduced Ogul and Medlevine to Millican and a conversation ensued in Millican's room. There were also some stock certificates which were spread out on the bed. At trial Millican was permitted to testify to certain statements made to him by Ogul. Ogul told Millican that he had obtained the stock from an attorney in Los Angeles. Ogul further told him that there were two brothers and a mother involved with the stock certificates, that one of them had died and that the surviving brother wanted to sell the stock for his own benefit without going through an estate. Millican in looking at one of the stock certificates, a Coca Cola Bottling of Los Angeles certificate, noted that it was in blank with no signature on the reverse side. Petitioner Smith asked Millican if this

stock was suitable for acquisition by the company that Petitioner was then working for, State Fire and Casualty Company of Miami, Florida. Millican told Petitioner that the certificates could only be transferred by the signature of the owner guaranteed by a bank officer or member of the stock exchange, or by execution of a stock power, or by the judgment of a court of competent jurisdiction. Millican then advised Petitioner that unless the transfer was effected by one of the foregoing methods, Petitioner should have nothing to do with the stock certificates. Petitioner stated that he did not want the stock unless it was a "legal situation."

In October, 1968 Petitioner Smith visited Benjamin Dobson, president of State Fire and Casualty Company, in the latter's home in Miami, Florida. At that time Petitioner showed Dobson a Coca Cola Bottling Company stock certificate which was in blank, *i.e.*, neither signed nor guaranteed. Petitioner explained to Dobson that the said stock was tied up in an estate which had not been settled and which involved two brothers. Dobson told Petitioner that he would like to have stock of that caliber in the company's investment portfolio, but until it could be transferred into the company's name, the company could not use it. Petitioner then stated that: "Then, if we can't use the stock in the company, well I'll give it back to the people I got it from."

On October 14, 1968 Dobson flew to New York City, where he stayed with Petitioner at the City Squire Hotel. Petitioner introduced Dobson to Ogul and Medlevine. Smith stated they were in New York to see co-defendant Tucker on business.

Also on October 14, 1968 George Henry observed Petitioner and two other persons in the offices of co-

defendant Emil Tucker. After the foregoing meeting, Tucker handed Henry a list containing shares of stock. At the top of the aforesaid list was written in Tucker's handwriting "Dalton S. 10-14-68".

On October 15, 1968 one Louis Greenberg came to Tucker's office for a meeting. Tucker then went into Henry's office with certain stock certificates and asked Henry to prepare a receipt for them for Greenberg's signature. Henry prepared the receipt in his own handwriting and checked it against the stock list Tucker had given him the previous day. When Henry examined the stock certificates at the time of preparing the receipt, all of them were signed on the reverse side but none of the signatures were guaranteed.

Greenberg signed the receipt prepared by Henry and received from Tucker all of the stock certificates listed thereon. Greenberg then sold the said stock piecemeal over a period of time through Koss & Company, a stock brokerage house in Brooklyn, New York. Greenberg paid Tucker in cash approximately $130,000.00 during the course of the stock sales, retaining approximately $20,000.00 for himself.

At one point during the sale, Koss became concerned about having guaranteed signatures on the certificates when the signers were unknown to him. Koss therefore demanded that Greenberg produce some proof of ownership of the securities. Greenberg notified Tucker and advised him that he needed some documentary proof of ownership as to the certificates. A bill of sale was typed in Tucker's office, and Tucker informed Geenberg that he was sending it to Los Angeles to have it notarized.

Throughout this period of time Ogul and Medlevine were going to Tucker's office frequently. Also about that time, Ogul informed his business associate, Morton Gorman, in Los Angeles that a man would be coming to see him. A man did come to see Gorman and asked Gorman to obtain a Notary stamp on a bill of sale. Gorman contacted a Richard Sherrill and together they obtained a Notary seal on the aforesaid document. The Notary stamp used was that of Allen C. Woodard, III who testified that he had observed Sherill using his stamp on November 11, 1968 and warned him against it.

Thereafter Greenberg went to Tucker's office and Tucker gave him the executed bill of sale. Tucker took the said document to Koss who thereafter continued the sale of the securities.

During the same period of time, Petitioner also visited Tucker's office on several occasions and called Tucker on the telephone. Tucker stated to Henry that the monies from the stock sale were distributed to Ogul, Medlevine, Petitioner, Greenberg and himself.

During the course of the stock sale, Tucker informed Henry that Greenberg was retaining a sizable portion of the proceeds for himself and that this created a problem for Tucker because he was obligated to pay the money to others. Tucker informed Henry that Ogul and Medlevine were pressuring him for the money. Subsequently, Tucker informed Henry that he had asked one Joe DiCiccio to help him collect the stock proceeds from Greenberg, and also resolve his problems with Ogul and Medlevine. Tucker described DiCiccio as a former bodyguard of John Masiello and also referred to DiCiccio as his (Tucker's) "umbrella".

In January 1969, Janet Vincent, the attorney for the Fildes' estate who had been attempting to locate the missing stocks, discovered that the stocks had been sold through the various stock transfer agents in Los Angeles. Through one of these agents, Vincent learned that the stocks had been sold through Koss & Company. Thereafter Vincent had telephone conversations with both Koss and Greenberg. After the aforesaid telephone conversations, Greenberg contacted Tucker in George Henry's presence and told Tucker to get the money back fast because the certificates were stolen and forged. Tucker assured Greenberg that the stocks were good, the signatures were genuine and that he should not worry.

Subsequently Greenberg had numerous conversations with Tucker about straightening out the stock situation. Tucker always told Greenberg that the situation would be straightened out, and demanded that Greenberg pay him the balance due him (Tucker) which was approximately $60,000. Henry and Greenberg were permitted to testify to various conversations in which Tucker and DiCiccio attempted to get Greenberg to pay the balance due and also there was talk of bribing a district attorney in Brooklyn, as well as bribing a detective. Throughout all of these numerous conversations, however, both Henry and Greenberg testified that Petitioner's name was never once mentioned.

The Government also introduced records of various telephone conversations allegedly made between Petitioner and the various other co-conspirators. However, many of the telephone calls were to or from hotels and there was no showing whatsoever as to which person at the hotels said calls were addressed.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below by the Ninth Circuit Court of Appeals Holding the Bruton Rule and the Sixth Amendment Right of Confrontation Not to Be Violated by the Admission Into Evidence of Extra-Judicial Statements of Alleged Co-Conspirators Not Available for Cross-Examination, Is in Conflict With the Decisions of Other Courts of Appeals on the Same Constitutional Issue; and Is an Important Question of Federal Constitutional Law Which Has Not Been, but Should Be Specifically Determined by This Honorable Court.

As the Statement of Facts indicates, the vast bulk of the evidence introduced by the Government at Petitioner's trial consisted of extra-judicial statements of alleged co-conspirator Tucker, as well as extra-judicial statements of Medlevine and Ogul also alleged co-conspirators. Co-defendant Tucker did not take the witness stand, and Medlevine and Ogul were absent from the jurisdiction and thus did not testify. As a result, no cross-examination of these individuals was possible by Petitioner. After the Government's opening statement, Petitioner's counsel pointed out to the Trial Court that the joint trial of Petitioner and co-defendant Tucker would present a *Bruton* problem because of the likelihood of having incriminating extra-judicial statements of co-defendant Tucker introduced into evidence with the consequent prejudice to Petitioner. The Trial Court stated that ". . . Bruton does not apply to something that happened during the crime, during the conspiracy. We still have the conspiracy rule." [R.T. pp. 93-94.] The Trial Court subsequently admitted into evidence all of the extra-judicial statements of alleged co-conspirators with a cautionary instruction to the jury

that the jury was not to consider the said statements against Petitioner unless the jury *first* found that a conspiracy existed, Petitioner was part thereof and the statements were made during the course and in furtherance of the conspiracy.[1]

The Ninth Circuit Court of Appeals in affirming Petitioner's judgment of conviction held that "There is a point about Bruton v. United States, 391 U.S. 123. This is not a Bruton case. United States v. Griffin (9th Cir., 1970), 434 F.2d 978, is applicable." The Ninth Circuit held in the *Griffin* case, *supra*, that *Bruton* rule is not applicable to a conspiracy prosecution in that extra-judicial statements of co-conspirators not available for cross-examination are exceptions to the hearsay rule and as such are not affected by *Bruton*.

---

[1]The full text of the Court's instructions to the jury was as follows:

> "Ladies and gentlemen, before hearing this conversation, I do want to instruct you with reference to the charged co-conspirators and conversations and statements of co-conspirators.
>
> "Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in the furtherance of some object or purpose of the conspiracy. Otherwise, any admission or incriminatory statement made or act done outside of court by one person may not be considered as evidence against any person who was not present and did not hear the statement made or see the act done.
>
> "Therefore, statements of any conspirator which are not in the furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making them." [R.T. pp. 175-176.]

Petitioner believes, and other Circuit Courts of Appeals have held (see *infra*) that the *Bruton* rule and the Sixth Amendment right of confrontation *are* applicable to conspiracy prosecutions.

In *Bruton v. United States* (1968) 391 U.S. 123, this Honorable Court held that an accused's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is violated at his joint trial with a co-defendant who does not testify by the admission of the co-defendant's confession inculpating the accused; notwithstanding jury instructions that the co-defendant's confession must be disregarded in determining the accused's guilt or innocence.

Prior to the *Bruton* case, the cases held that an instruction to the jury to disregard extra-judicial statements of a co-defendant inculpating the defendant in determining the defendant's guilt or innocence, was sufficient because juries could be relied upon to follow the Court's instruction to disregard the testimony.

The last United States Supreme Court ruling that juries could be relied upon to follow such a Court instruction was *Della Paoli v. United States*, 352 U.S. 232, 1 L.Ed. 2d 278, 77 S.Ct. 294 (a five to four decision).

That case was expressly overruled by the *Bruton* case in which this Honorable Court stated:

> "We hold that because of the *substantial risk* that the jury, *despite instructions to the contrary*, looked to the incriminating *extra-judicial statements* in determining Petitioner's guilt, admission of Evan's confession in this joint trial violated Petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." (Emphasis Added.)

In challenging the basic premise that a properly instructed jury would ignore the co-defendant's inculpation of the defendant in determining the latter's guilt, this Honorable Court stated:

> "*The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition, therefore, becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.* (Citing from the dissent in the *Della Paoli* case, which dissent was adopted by the majority in the *Bruton* case.) The Government should not have the windfall of having the jury be influenced by evidence against the defendant *which, as a matter of law, they should not consider but which they cannot put out of their minds* (Citation omitted). To the same effect and also cited in the *Jackson* note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S.Ct. 716: '*The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .*'" (Emphasis added.)

The *Bruton* case, citing from the leading California case of *People v. Aranda*, 63 Cal.2d 518, 407 P.2d 265, also pointed out that the logic of its ruling is not limited to unconstitutionally obtained confessions, but extends to "obviating the risks that the jury may rely upon *any* inadmissible *statements*". (Emphasis added.)

The *Bruton* case then pointed out that "our action in 1966 in amending Rule 14 of the Federal Rules of Criminal Procedure also evidences our repudiation of *Della Paoli's* basic premise. Rule 14 authorizes a severance where a defendant *Might* be prejudiced by a joint trial." (Emphasis added.)

This Honorable Court in *Bruton* went on to point out that it isn't just a confession of a co-defendant that is covered by the ruling, but it embraces a confession *or* a *statement* of a co-defendant. It states as follows with reference to the 1966 amendment of Rule 14:

> "The Advisory Committee on Rules said in explanation of the amendment: 'A defendant may be prejudiced by the admission in evidence against a co-defendant *of a statement or confession* made by that co-defendant. *This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand.* Limiting instructions to the jury may not, in fact, erase the prejudice . . . The purpose of the amendment is to provide a procedure whereby the issue of *possible* prejudice can be resolved on the motion for severance . . ." (Emphasis added.)

The *Bruton* case is replete with footnotes citing authorities that refute the ridiculous notion that a jury can be relied upon to put this type of prejudicial evidence out of its mind simply because the trial Court instructed them to do so. These footnotes state, *inter alia*, as follows:

> *"It has been suggested that the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay."* See *Broeder*, The University of Chicago Jury Project, 38

Nebraska Law Review, 744 (1959). (*Bruton*, p. 482 footnote 4)

"*Judge Hand addressed the subject several times. The limiting instruction, he said, is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but everybody else's* (Citation omitted). Nobody can indeed fail to doubt whether the action is effective, or whether usually the practical result is not to let in hearsay (Citation omitted). *It is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition.' Judge Hand referred to the instruction as a 'placebo', medically defined as 'a medicinal lie'. Judge Jerome Frank suggested that its legal equivalent 'is a kind of judicial lie'. It undermines a moral relationship between the Courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.'* " (Citations omitted.) (*Bruton*, p. 483, footnote 8.)

"Compare E. Morgan, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 105 (1956), who suggests that *the use of limiting instructions fosters an inconsistent attitude towards juries by 'treating them at times as a group of low-grade morons, and at other times as men endowed with super-human ability to control their emotions and intellects.'* " (*Burton*, p. 483, footnote 8)

Is suggested that because the evidence is so unreliable the need for cross-examination is obviated. This would certainly seem contrary to the acceptance of the Rule of Evidence which would

require exclusion of the confession as to *Bruton* as 'inadmissible hearsay, a presumptively unreliable out-of-court statement of a non-party who was not a witness subject to cross-examination.' *Post,* at p. 486. The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error, and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. *5 Wigmore,* Evidence § 1362, at 3. The reason for excluding this evidence as an *evidentiary matter* also requires its exclusion as a *constitutional* matter. (Emphasis the Courts). Surely the suggestion is not that *Pointer v. Texas,* for example, be repudiated, and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of 'all the dangers of inaccuracy which characterize hearsay generally.' *Post,* at 488." (*Bruton,* p. 485, footnote 12.) (Emphasis added.)

Mr. Justice Stewart, in a concurring opinion in the *Bruton* case, stated as follows:

"Quite apart from Jackson v. Denno, however, I think it clear that the *underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a co-defendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial.* A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see e.g., *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed. 2d 923, 85 S. Ct. 1065; *Douglas*

> *v. Alabama,* 380 U.S. 400; 13 L.Ed. 2d 934, 85 S.Ct. 1074) are at once so damaging, so suspect, and yet so difficult to discount, that juros cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial Judge may give. (Emphasis in Courts). See the Court's opinion, ante, at 485, note 12. It is for this very reason that out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. (Emphasis the Court)"

In the instant case the Trial Court gave and relied on the same type of cautionary instruction which was so criticized in *Bruton,* when it simply instructed the jury to disregard the extra-judicial statements of alleged co-conspirators which implicated Petitioner, unless a conspiracy was first found. Thus the Trial Court assumed that the jury was capable of putting this hearsay completely out of its collective minds, and totally ignoring it, while it deliberated first on the question of whether a conspiracy existed. This procedure supposes that "not one juror succumbed to the nigh irresistible temptation" to resort to this evidence in determining whether a conspiracy existed. (See *Bruton,* Footnote 4, p. 481, citing *United States v. Bozza,* 365 F.2d 206.)

The Second Circuit Court of Appeals in *United States v. Castello,* 426 F.2d 905 (1970) and the Tenth Circuit Court of Appeals in *Nolan v. United States,* 423 F.2d 1031 (1970) have held in very recent cases that the *Bruton* rule and the Sixth Amendment right of confrontation *are* applicable to conspiracy prosecutions. The Seventh Circuit Court of Appeals so held in

the case of *United States v. Guajado-Melendez,* 401 F.2d 35 (1968).

On the other hand, the Third, Fifth, Sixth and Eighth Circuit Courts of Appeals have taken a position in conformity with the Ninth Circuit Court of Appeals and have held that the *Bruton* rule is not appliable to a conspiracy prosecution in that extra-judicial statements of co-conspirators not available for cross-examination are exceptions to the hearsay rule and as such are not affected by *Bruton* or the Sixth Amendment right of confrontation. See *Parness v. United States,* 415 F.2d 346 (3rd Cir. 1969); *Migliore v. United States,* 409 F.2d 786 (5th Cir. 1969); *Campbell v. United States,* 415 F.2d 356 (6th Cir. 1969); *United States v. Schroeder,* 433 F.2d 846 (8th Cir. 1970).

Because of the above stated conflicts in the recent decisions of the Circuit Courts of Appeals on this fundamental Contitutional issue, *i.e.,* the right of confrontation, this Honorable Court ought to review the decision and judgment of the Ninth Circuit Court of Appeals in the instant case, and determine whether or not the *Bruton* rule and the Sixth Amendment right of confrontation are applicable to conspiracy prosecutions.

In this connection Petitioner urges that by failing to reverse the decisions of those Circuit Courts of Appeals which have held the *Bruton* rule and the Sixth Amendment right of confrontation not to be applicable to conspiracy prosecutions, this Honorable Court would be condoning the unjustifiable denial of the protections of the Sixth Amendment to a particular class of accused, *i.e.,* those charged with conspiracy. Such an unwarranted classification, *i.e.,* arbitrarily denying Sixth

Amendment rights to those charged with conspiracy, would most surely be a denial of due process as to those charged with conspiracy, and would doubtless encourage the Government to add a conspiracy count to any substantive offenses charged, thereby effectively circumventing the *Bruton* rule and the Sixth Amendment guarantee of the right of confrontation.

2. The Decision Below by the Ninth Circuit Court of Appeals Upholding the Procedure of the Trial Court Which Permitted Extra-Judicial Statements of Alleged Co-Conspirators to Be Admitted Into Evidence and Heard by the Jury Prior to the Government's Proving Prima Facie the Existence of a Conspiracy Violated Petitioner's Rights Under the Fifth Amendment Due Process Clause; and Is an Important Question of Federal Constitutional Law Which Has Not Been, but Should Be Specifically Determined by This Honorable Court.

It is well established that *before* the extra-judicial declarations of conversations of a co-conspirator are admissible against a defendant, there must be independent evidence of the conspiracy and defendant's connection with it and that the declaration was made in furtherance of and during the pendency of the alleged conspiracy. *Glasser v. United States* (1942) 315 U.S. 60, 75; *Carbo v. United States* (9th Cir. 1963) 314 F.2d 718, 735, cert. denied 377 U.S. 953.

In the instant case, the trial court used the generally accepted procedure of permitting the Government to introduce and the jury to hear extra-judicial statements of alleged co-conspirators prior to the Government's establishing, *prima facie*, that a conspiracy existed and that an accused was connected therewith. In the instant

case, the trial court admonised the jury that is should not consider the extra-judicial statements of alleged co-conspirators unless it first found a conspiracy and that defendant was connected therewith, and further that the statements were made in furtherance of and during the course of the conspiracy.

The Ninth Circuit Court of Appeals in affirming Petitioner's judgment of conviction upheld the procedure utilized by the trial court and simply stated:

> "Objection is made that when certain statements of co-conspirators were admitted in evidence the conspiracy hadn't been proved. In this case we find this to be only a question of order of proof within the trial court's discretion."

Petitioner respectfully argues that his objection to the procedure utilized by the trial court relates not merely to the "order of proof" but is a much more fundamental objection: *i.e.*, Petitioner urges that the procedure utilized by the Trial Court and upheld by the Ninth Circuit Court of Appeals, violated Petitioner's right to Due Process under the Fifth Amendment to the United States Constitution.

In the procedure utilized by the trial court in the instant case, the jury was instructed to totally disregard the extra-judicial statements of co-conspirators which it had heard *until* it had first determined from independent evidence that a conspiracy in fact existed, and that the defendant was connected with it. This is a strikingly similar situation to that which existed with respect to the voluntariness of a confession prior to the case of *Jackson v. Denno* (1964) 378 U.S. 368. Prior to *Jackson v. Denno* a jury was permitted to hear an out of court confession of a defendant prior to any de-

termination by the trial court that the said out of court confession was not coerced. The jury was then instructed, that, after having heard the confession, it should not consider the confession until it had first determined that the confession had been voluntarily made. In rejecting this rationale in *Jackson v. Denno, supra,* this Honorable Court stated:

> "'. . . *Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged in by the Courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it . . . And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which as every judge and lawyer knows, cannot be obeyed.* (Cite Omitted)'." (Emphasis added.) *Jackson v. Denno, supra,* footnote 10 at pp. 382-383.

That such a limiting instruction as is now currently given in a conspiracy case is totally ineffective when given to a jury of laymen, is further borne out by the decision of this Honorable Court in *Bruton v. United States* (1968) 391 U.S. 123. With respect to the ineffectiveness of limiting instructions to juries, that case stated:

> "*The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition, therefore, becomes a futile*

collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. (Citing from the dissent in the *Della Paoli* case, which dissent was adopted by the majority in the *Bruton* case.) The Government should not have the windfall of having the jury be influenced by evidence against the defendant *which, as a matter of law, they should not consider but which they cannot put out of their minds* (Citation omitted). To the same effect and also cited in the *Jackson* note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States,* 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S.Ct. 716: *'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . .'* " (Emphasis added.)

Therefore with respect to the present procedures employed in conspiracy prosecutions, we have a situation in which the jury is permitted to hear the extra-judicial statements of alleged co-conspirators and then it is told to disregard these very same statements until it has first determined from independent evidence that a conspiracy, in fact, existed. Clearly this is asking the jury to do what this Honorable Court found it could not do in the cases of *Jackson v. Denno, supra* and *Bruton v. United States, supra.*

Therefore, Petitioner urges that this Honorable Court review the entire procedure with respect to conspiracy trials, and make a determination that Due Process is violated when the Government is permitted to introduce extra-judicial statements of alleged co-conspirators

prior to the establishment *prima facie* of the existence of a conspiracy from independent evidence. Petitioner respectfully urges therefore that with respect to conspiracy prosecutions, this Court adopt a procedure similar to that employed under its decision in *Jackson v. Denno, supra* with respect to coerced confessions, *i.e.*, that the trial court in camera hold a hearing out of the presence of the jury in which the Government will submit the independent evidence which it has to prove the existence of a conspiracy and that the trial court will make a preliminary determination that there is sufficient independent evidence of the conspiracy to permit the jury to hear any extra-judicial statements of alleged co-conspirators.

3. The Failure of the Trial Court to Order the Government to Produce the Minutes of the Prior Grand Jury Testimony of the Witness Jerry Millican, After Repeated Requests by the Defense That Said Minutes Be Produced, Violated the Jencks Act, 18 U.S.C. 3500, and Constituted Reversible Error.

By the October 15, 1970 amendment to the Jencks Act, 18 U.S.C. §3500, Congress specifically added to its definition of the term "statement", "(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a *grand jury*" (emphasis added); thus superseding case law which had held that grand jury testimony was not within the scope of the Jencks Act. *Pittsburgh Plate Glass Co. v. United States* (1959) 360 U.S. 395.

A current reading of the Jencks Act therefore would require that in a criminal prosecution, once a witness called by the United States has testified on direct exam-

ination, ". . . the court *shall,* on motion of the defendant, order the United States or produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." (Emphasis added.) When the United States fails to make such a "statement" available to the defense as required by the Jencks Act, then "the court *shall* strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared." (Emphasis added.)

In the instant case, Jerry Millican was called as one of the three key Government witnesses against Petitioner. After Mr. Millican's direct testimony, defense counsel requested a copy of the minutes of prior Grand Jury testimony of Mr. Millican in Nashville in 1969 (the Grand Jury testimony of Millican in California was made available) to defense counsel which was related to the same facts and events as his direct testimony at Petitioner's trial.

Millican admitted that at the time of his testimony at Petitioner's trial as to these facts and events at the Nashville Grand Jury that his recollection and memory of these facts and events was much better than at the present time because his testimony in Nashville took place in March, 1969.

The witness also stated that he was interviewed by F.B.I. agents; members of the Justice Department and U.S. attorneys from other parts of the country as to details of this case. None of these statements were ever produced by the Government for the defense nor was any reason ever given by the Government for this failure to so produce them.

At Petitioner's trial, the prosecutor admitted that several weeks before the trial, he noticed Mr. Millican's reference to the Nashville Grand Jury testimony and called people in the Department of Justice, in particular, one Mike Epstein who was familiar with the matter; that he asked Mr. Epstein for the transcript of the Grand Jury; that he had further communications with Mr. Epstein since that time and that he had "the latest one today". The Government stated that a Grand Jury transcript of the Nashville testimony *had been prepared*, and sent to Washington but that the file was missing with the transcript. The Government then stated that an effort "*is being made*" to see if the Court Reporter could be located.

Defense counsel then pointed out that "we have an absolute right to this" and that efforts should have been made long ago (after the California Grand Jury hearing) to get this material and he then requested that the material should be submitted to the Court *in camera* for a determination.

The Court then stated that it was not going to delay the trial for this purpose and that "they have made every search".

However, the Government explanation as to the unavailability of the Nashville Grand Jury transcript at the time of trial, *i.e.*, Justice Department lost file, etc., is totally inadequate. It must be remembered that the Los Angeles Grand Jury indictment against Petitioner was returned in September of 1970 and that his trial did not begin until January 5, 1971. It is hard to understand the difficulty in obtaining a Grand Jury transcript for over 4 months. Furthermore, a re-transcription could have and should have been ordered in

time for trial so that it could have been properly utilized by the defense. In this connection it must be noted that a re-transcription was ultimately ordered and received by the Government, not unfortunately in time for Petitioner's trial (where it could have been utilized by the defense), but fortuitously enough, in time to be utilized by the Government in opposition to Petitioner's Motions for New Trial and/or Judgment of Acquittal.

Furthermore, there *were* several *major* inconsistencies in the testimony which Millican gave before the Nashville Grand Jury as opposed to his testimony at Petiioner's trial. In his Nashville Grand Jury testimony, Millican stated, "Of course, I took the stock and put it in my briefcase, but I never tried to do anything with it. I took it back to him." The foregoing was in direct contrast to Millican's testimony at Petitioner's trial where Millican testified that he simply left the meeting at the Palmer House because he had a dinner engagement, with no mention of this taking the stocks. In his Nashville Grand Jury testimony, Millican also stated that "*I am certain* that some of the stock is now in the portfolio of the State Fire and Casualty of Miami . . . *I am certain* that Mr. Dobson has put this stock into the portfolio of that corporation . . ." (Emphasis added.) That testimony was confrary not only to the testimony Millican gave at trial, but also to the testimony of Benjamin Dobson. At this point it must be emphasized that Millican and Dobson were two of the three key Government witnesses against Petitioner Smith (the other being George Henry).

The fact that Millican's Grand Jury testimony varied substantially from his trial testimony would have enabled the defense, had the Government made the Nash-

ville Grand Jury testimony available to the defense, to impeach not only Millican but also Dobson. Millican's Nashville Grand Jury testimony therefore would have been extremely valuable to the defense. In this connection the language found in the case of *United States v. Meisch*, 370 F.2d 768, 772 (3d Cir. 1966) is applicable to the instant case.

> "The fact that Szpak's testimony was more revealing than the case report is not a valid reason for refusing to permit the defense to see it. This is not the test under the statute. *The purpose of requiring the delivery to a defendant of a prior statement 'which relates to the subject matter as to which a witness has testified' is not solely to provide him a means of obtaining information divulged by the witness's testimony, but to give him an opportunity to use it as he deems fit for trial purposes. '[W]hether the statements may be useful purposes of impeachment is a decision which rests, of course, with the defendant himself.'* " *Scales v. United States*, 367 U.S. 203, 258, 81 S.Ct. 1469, 1501, 6 L.Ed.2d 782 (1961). (Emphasis added.)

Since Millican and Dobson were two of the three key and only Government witnesses against Petitioner Smith (the other being George Henry) the possibility of impeaching either or both of them undoubtedly would have affected the outcome of the trial. Furthermore, as was stated in *United States v. Missler*, 414 F.2d .... (4th Cir. 1969):

> "The requirements of the Jencks Act are intended to provide defendants in federal prosecutions with an opportunity for thorough cross-

examination of government witnesses, making the constitutionally guaranteed right of confrontation more meaningful. *Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances.* See *Killian v. United States*, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961); *Rosenberg v. United States*, 360 U.S. 367, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959). *Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated.*" (Emphasis added.) *Id.* at pp. 303-304.

In the instant case, it most surely *cannot* be said that "it is perfectly clear that the defense was not prejudiced by the omission" of the Government to supply Millican's Grand Jury testimony; hence a "reversal is indicated."

The failure of the Trial Court to order the Government to produce this prior testimony of Mr. Millican, or in the alternative, the failure of the Trial Court to strike the testimony of Mr. Millican from the record, or in the alternative, the failure of the court to declare a mistrial at that point was, in and of itself, such prejudicial error as to require reversal of Petitioner's judgment of conviction.

In spite of extensive briefing on this very point, the Ninth Circuit Court of Appeals in its decision below (see Appendix A, *infra* p. 1) did not even discuss

this issue, but dismissed Petitioner's entire argument *re* violation of the Jencks Act, 18 U.S.C. § 3500, with the phrase "Other points raised we find insubstantial."

Petitioner believes that this point is substantial enough to warrant consideration by this Honorable Court and therefore prays that this Honorable Court will grant this Petition and review what was most clearly a violation of the express intention of Congress, *i.e.*, that prior Grand Jury testimony of a witness called by the Government in a criminal prosecution be made available to the defense for impeachment purposes.

4. The Failure of the Trial Court to Give Petitioner Smith's Counsel Reasonable Time to Examine the Material Produced Pursuant to 18 U.S.C. 3500 and to Properly Prepare for Its Use, Constituted Reversible Error.

Section 3500, Title 18 U.S.C. provides that the Court may recess proceedings in a trial for such time as may reasonably be required for the defendant to examine and *prepare for the use of* the material produced pursuant thereto.

It is obvious that unless the defendant has sufficient time to properly prepare for the use of such material, the mere production of it becomes a futile gesture. In the instant case, the 3500 material is in excess of several hundred pages.

In passing, it should be noted that in most state jurisdictions, including the States of California since 1956, the defendant is afforded the right to have copies of this material long prior to the trial itself. This is likewise true in England.

The restriction contained in Section 3500 to the effect that it is not necessary to produce the material until *after* the particular witness has testified at the trial is, in itself, an unreasonable restriction (and in the opinion of the writer hereof, an unconstitutional denial of Due Process).

Any trial lawyer knows that much advance preparation is required for the proper cross-examination of a witness. Otherwise, the Confrontation Clause of the Sixth Amendment becomes emasculated.

In view of the foregoing, the provision in the statute as to giving the Defendant reasonable time to examine *and prepare for the use of* this material becomes extremely significant. This is particularly true in the instant case where a Motion for a Bill of Particulars was made prior to the trial, but said motion was never ruled upon prior to the first day of trial.

When the matter was called to trial, the defense pointed out to the Court that no ruling had ever been made in connection with a Motion for a Bill of Particulars, and the Court then denied the motion without comment.

Thus, the defense was in a position where it had no Bill of Particulars to assist them in preparation for a cross-examination, which made it even more necessary to receive sufficient time for them to examine and prepare for the use of the 3500 material.

The affidavit of Jeremiah Casselman, trial attorney for Petitioner, pointed out that:

(1) He was promised copies of exhibits by the Government prior to trial;

(2) He never received said copies prior to trial;

(3) He requested the 3500 material prior to trial and this request was refused;

(4) That it was an "almost impossible task" to read and prepare for the use of the 3500 material in the time he was permitted and to prepare for the cross-examination of the witnesses;

(5) That as a result, he could not effectively cross-examine the Government witnesses.

At differnt times during the trial, defense counsel complained that they did not have sufficient time to read the 3500 material and prepare for its use in cross-examination.

The following colloquy took place at a side-bar conference as set forth on pages 459-460 of the R.T.:

"MR. LaROSSA: I have not had an opportunity to complete this 3500 material.

"THE COURT: I'm sorry, gentlemen. You have had long enough to complete this. You haven't had that many witnesses to go over. Proceed with your cross examination.

"MR. LAROSSA: Would your Honor allow me to make a record of this

"THE COURT: Make a record of it—

"MR. LAROSSA: I don't know whether you know how much 3500 material we received.

"THE COURT: I understand what you have received.

"MR. LAROSSA: We received yesterday I would estimate somewhere in the area of seven hundred pages. I know from my own viewpoint I worked late into the evening until I could work no more, until this morning, as a matter of fact, until this morning, going over everything and I did not expect this witness to be on till the end.

"THE COURT: Don't you have a witness left?

"MR. NISSEN: Your Honor, counsel has received a list of witnesses stating in order of their appearance. I have advised them that they will be appearing in that order, and they have been, sir, so they have been informed on the order of witnesses, exhibit witnesses.

"THE COURT: All right. You have made your record. Proceed with your cross examination of this witness.

"MR. CASSELMAN: Your Honor, may I also point out that I have had the same problem. I worked until approximately 2:30 last night on the 3500 statement.

"THE COURT: All right."

Despite these complaints of defense counsel, the Court then required counsel to forthwith proceed with their cross-examination of the next witness, Mr. Gorman.

Again at R.T. p. 582, Defendant Smith's counsel points out to the Court that he had to stay up until 2:30 a.m. that day reading the 3500 material.

It has often been stated by Courts with respect to discovery procedures that a lawsuit is not a game, and that fairness to both sides is required to assure justice. To permit the Government to withhold 3500 material until the last possible moment, when it could have been produced earlier, with the result that the defense is unable to properly prepare for cross-examination, results in an unconscionable advantage for the prosecution and correspondingly results in a lack of Due Process for the defense, and constitutes reversible error.

5. Various Errors Occurred at Trial Which Prejudiced Petitioner's Right to a Fair Trial, as Well as His Right to Due Process Under the Fifth Amendment to the United States Constitution.

A. Inflammatory and Prejudicial Conduct of the Government.

Considerations of time and space do not permit the detailing of each and every example of misconduct on the part of the prosecution. Suffice it to say that a simple reading of the opening statement and of the argument to the jury by the prosecution shows many illustrations of totally improper remarks.

In the first instance, the record is replete with instances in the Prosecutor's argument to the jury in which alleged statements of fact and testimony of witnesses are totally unsupported by the evidence. In fact, in many instances the evidence is *directly contrary* to that alleged by the Prosecutor in his argument.

The following, because of the pressures of time and space, is necessarily only a partial (but Petitioner believes more than sufficient) list of instances in which the Prosecutor argued alleged statements of fact and testimony of witnesses which was totally unsupported by the evidence:

1. Prosecutor alleged that George Henry testified Tucker related a conversation to him in which Smith told Tucker that, "they want me to sell it [*i.e.*, the stock] because it is not guaranteed." [R.T. p. 1028.]

In fact, Henry *never* so testified.

2. Prosecutor alleged that George Henry testified "Tucker says also to Henry that Smith is demanding more money from the stock." [R.T. p. 968.]

In fact, the only reference by Henry to Tucker's telling him that anyone was demanding more money from the stock sale, was to Leonard Frenchie, the representatives of the people in California. [R.T. pp. 254-255.]

3. Prosecutor alleged that Benjamin Dodson testified Tucker told him, "I haven't collected at all. I have this much from Greenberg and I gave Smith this much and I haven't got the rest of it." [R.T. p. 964.]

In fact, Dobson *never* so testified. In the conversation that the Prosecutor had reference to, *Tucker did not mention Smith,* or even Greenberg. Dobson testified that Tucker told him, "Well, he said that he paid everybody everything he owed them, that he didn't owe anybody any money, that he hadn't collected some money, and he was waiving his arms about that he had paid them all that he owed them." [R.T. pp. 212-213.]

4. Prosecutor argued to the jury that "It is not a question of Leo and Frenchie having the stock and coming to New York with it. Dalton Smith came to New York with it [*i.e.*, the stock]." [R.T. p. 1026.]

In fact, there was no evidence in the record to support that statement.

5. Prosecutor asserted that "When Tucker came out with that piece of paper, the stock listed on it, and gave it to Henry, *he also later told Henry, as you will recall, that he had received the stock from Tucker* [sic., Smith]." (Emphasis added.) [R.T. pp. 1025-1026.]

While the prosecutor mistakenly referred to Tucker receiving the stock certificates from "Tucker", instead of from Smith, there can be little doubt that within the context of his argument on pages 1025-1026 of the

Reporter's Transcript the Prosecutor meant, and the jury understood him to mean, that Henry testified that Tucker told him that he had just received the stocks from Defendant Smith.

In fact, that was a point covered rather carefully in the testimony of George Henry. In this respect Henry testified:

"Q. You do not know whether or not Mr. Smith was present at that point; isn't that correct?

A. Now, at which time?

Q. When the stock was brought to Mr. Tucker.

A. I did not see the stock physically delivered to Mr. Tucker. *I saw Mr. Smith in the office immediately prior to the time that Mr. Tucker told me that the stock was delivered to him.*" (Emphasis added.) [R.T. p. 409.]

Again at R.T. p. 368, Henry testified:

"Q. When the stock was delivered, sir, who was present?

A. The only—I saw Mr. Dalton Smith through Mr. Tucker's office door, and as I recall it, there were two individuals whose backs were to me, and I did not know who they were, one of which I said was identified by Mr. Tucker subsequent to the meeting as an attorney from New Orleans.

Q. *Do you know as a matter of fact that that stock was delivered at that time?*

A. *I couldn't swear to it. I wasn't present at the meeting.*

Q. *You wre not present when it was delivered?*

A. *No, sir.*" (Emphasis added.)

In short, Henry never testified that Tucker told him that Smith delivered the stocks to him.

6. Prosecutor also repeatedly alleged in his argument that the stock was ". . . forged while it was in Dalton Smith's possession." [R.T. pp. 960, 1027.]

In fact, there was no evidence in the record to support that assertion.

7. Prosecutor alleged that Ogul and Medlevine called Smith on November 12, 1968 and told Smith, "We got it." And that on November 13, 1968 Smith called Tucker and told him, "It is coming." [R.T. pp. 966-967.]

Again, there was no evvidence to support such assertions by the Prosecutor.

In spite of the foregoing, the United States government asserted that in its brief to the Ninth Circuit Court of Appeals the Trial Court's instructions to the jury that the statements of counsel are not evidence, corrected the matter; and even if they didn't, Defendant Smith by failing to object, waived his right to assert these errors on appeal. (App. Br. p. 46.) A strikingly similar argument was made by the U.S. Government but rejected by the Circuit Court of Appeals in the case of *United States v. Guajardo-Melendez*, 401 F.2d 35 (7th Cir. 1968).

In that case, the Court rejected the Government's contention that a statement by the Prosecutor in his argument which was totally unsupported by any evidence to the effect that a co-conspirator had told a police agent that defendant had been supplying him with narcotics, was obviated by the Trial Court's instructions to the jury about the argument of counsel.

and further that defendant's failure to object constituted a waiver. The Court in reversing defendant's conviction stated in pertinent part:

"During his closing argument, an advocate is permitted to make any comments which are supported by the evidence of record in the case. An advocate is likewise within the bounds of propriety in replying to an argument raised by his opposing advocate. United States v. Doyle, 234 F.2d 788 (7th Cir.) cert. denied, 352 U.S. 893, 77 S.Ct. 132, 1 L.Ed.2d 87 (1956).

* * *

"Neither a basis in the evidence nor appropriate reply justified the assistant United States Attorney's other comment. There was no evidence that Soto had told Agent Jordan that Hernandez (and Santoya) were his source of narcotics supply. Thus, the assistant United States Attorney's gratuitous statement that Agent Jordan had so testified was untrue. Although the Government concedes that the agent did not so testify, it attempts to dismiss the import of counsel's statement on the grounds that it was inadvertent, that Soto did in fact bring Jordan to Hernandex (and Santoya) to consummate the transaction, and that the court instructed the jury on four occasions to trust their own recollection and not that of counsel.

"We believe that this statement was sufficiently prejudicial to necessitate a new trial. What the statement amounted to was 'testimony' of an alleged hearsay statement of a guilty participant, Soto, that incriminated Henandez (and Santoya) in illegal activities. This gratuitous statement was particularly damaging in that it conflicted with

Hernandez' (and Santoya's) testimony that they were 'innocent dupes' who were doing Soto a favor and were ignorant of the contents of the package which contained hereoin. *Since Soto did not testify at the trial neither Hernandez (nor Santoya) could cross-examine him about the alleged statement attributed to him. As a consequence. Hernandez (and Santoya) were subjected to a denial of their amendment right of confrontation which could not be cured by instructions to the jury. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (May 20, 1968). Moreover, the asistant United States Attorney's statement, coming as it did during his closing argument and lacking any evidentiary foundation in the testimony at the trial, made any attempt at confrontation or argumentative reply impossible. The Government argues that Hernandez (and Santoya) neither objected nor moved for a mistrial when the statement was made, thereby waiving their objection. The Government's waiver point is not well taken because the statement amounted to plain error 'affecting substantial rights' under Fed. R. Crim. P. 52 (b).*" (Emphasis added.) *United States v. Guajardo-Melendez, supra* at 39-41.

In the instant case, unlike the *Guajardo-Melendez* case, there was *not just one instance* in which the Prosecutor's statements lacked any evidentiary foundation in the testimony, but rather a plethora of such instances. In all other respects, including the fact that most of these statements related to extra-judicial declarations of co-conspirators who were unavailable for

cross-examination, the instant case is identical to the situation in the *Guajardo-Melendez* case, and as such required the reversal of Petitioner's judgment of conviction.

In addition to the aforesaid statements in the prosecutor's argument which were totally unsupported by any evidence, the prosecutor also made highly prejudicial and needlessly inflammatory remarks in his argument to the jury. The prosecutor made repeated references to Joe DiCiccio, Johnny Masiello and thugs, hoodlums and the like, even though he had previously been admonished by the Trial Court that if he asked one more question concerning Joe DiCiccio the Court would declare a mistrial.

The prosecutor also made reference to Joe DiCiccio's bribing the district attorney in New York, references to "threats", "demands" and "crooks cutting up the pie" and then in the very next sentence makes reference to Petitioner as being "just what the evidence showed him to be." Nowhere did anyone in this trial ever testify that Petitioner had anything to do with or even knew Joe DeCiccio or anything to do with any attempt at bribing any district attorney. The only "evidence" with reference to Joe DeCiccio and the reference to bribing the district attorney in New York had to do with the dispute that arose between *Tucker* and *Greenberg*. It is respectfully submitted that anyone who reads the argument of the Government to the jury with reference to Petitioner will come to the conclqsion that these inflammatory, highly prejudicial and highly incorrect statements inflamed the passions and prejudice of the jury. For example, at page 969 of the R.T. the prosecutor stated:

> "What did he do? Remember Joe DeCiccio, the bodyguard of John Masiello, according to Tucker. Tucker tells people that 'This is the bodyguard of John Masiello.' "

What possible legitimate reason did the Government have in referring to Joe DeCiccio at all, particularly in view of the Court's prior admonition in this connection, let alone referring to him twice in that one sentence as being the bodyguard of John Masiello, a notorious hoodlum. On that same page 969, the Government stated:

> "Mr. Henry, by the way, is present with Tucker and Joe D. when he hears Mr. DeCiccio tell Tucker that he has obliga ed himself to a Brooklyn detective to stall off the investigation for the sum of $8000 and he is complaining that that no good Greenberg won't pay the $8000, an outrage."

On the very next page, [R.T. p. 970] the Government quoted Tucker, according to Mr. Lerner, as saying Joe DeCiccio was "his umbrella".

What in the world could this possibly have to do with this case or the charges against Petitioner? It is hearsay piled upon hearsay coming from people that Petitioner had never met in his life.

The Ninth Circuit Court of Appeals in its decision below did not make any reference whatsoever to Petitioner's argument with respect to the prejudicial conduct of the Government, but evidentally rejected it out of hand with the phrase "other points raised we find insubstantial."

Petitioner believes that the aforesaid point is substantial and that because of the aforesaid conduct of the Government, Petitioner was denied his right to a

fair trial and to due process under the Fifth Amendment.

B. Bias and Hostility of the Trial Court.

The Trial Court throughout Petitioner's trial exhibited an attitude of open hostility and obvious bias against Petitioner's trial counsel, Mr. Jeremiah Casselman, and unltimately, of course, against Petitioner himself.

As every trial lawyer knows, the open and continued hostility of a Trial Court against a particular party's trial counsel (especially in a criminal case) is ultimately accepted by an unsophisticated jury as some reflection upon the merits of a party's position. Ultimately, the hostility of the Trial Court is transferred in the jury's minds, from the trial counsel to his client.

Because of the limitations of time and space, Petitioner can only highlight the many instances of such hostility at his trial.

1. *Trial Court overruled Petitioner's objections in many instances without permitting counsel to even state the basis for his objections: i.e.,*

(a) R.T. 299-301. Objection on redirect of Millican. Casselman: "I don't know whether the Court is aware of what my grounds [for objection] are." Court: "You have already stated them at the bench." "This is a completely different objection." Court: "Now, will you please sit down . . ."

(b) R.T. 301. Redirect Millican. Casselman: "Does the Court want to hear my grounds?" Court: I know the grounds. . . . overruled."

2. *Trial Court overruled defense objections without understanding them: i.e.,*

(a) R.T. 113. Direct of Fildes. Objection re question whether Fildes knew how Tucker and Smith obtained

stocks. Court : "Overruled. That is that you signed it." |sic| Witnesses: "No sir."

3. *Trial Court failed to even acknowledge defense objections at times: i.e.,*

(a) R.T. 568. Direct of Greenberg. Casselman: "Excuse me, your Honor. I object to the word 'they.'" No ruling by Court and continued testimony and by Greenberg. Casselman: "My objection was overruled, sir?" Court: "Yes." Testimony continued.

4. *Trial Court arbitrarily and erroneously limited scope of defense counsel's examination of witnesses, thereby limiting his effective conduct of the defense: i.e.,*

(a) *On cross-examination.* R.T. 316-317. Of Dobson. Casselman attempted to show Tucker involved in obtaining guarantee bonds for State Fire and for which Tucker received commission. Objection by Government as "irrelevant and outside scope of direct examination." Court: ". . . sustained." Casselman: "*I will offer to connect up.*" Court: "Objection sustained." In spite of testimony of Dobson that Smith said Tucker owed him some money.

(b) *On direct examination.* R.T. 862-863. Of Bubis Casselman: "On the 15th did you spend the day with Mr. Smith?" A. "I did." Q. ". . . what were you doing on that date?" Objection, immaterial. Court: "Sustained." At the bench. Casselman: "I offer to prove that Mr. Smith was with Mr. Bubis all of that day where they went and what they did. That would be the 15th of October, 1968. . . . |I|t is critical testimony." Court: "That is not the question you asked." Casselman: "What did I ask him, your Honor?" ". . ." Court: "I'm not going to tell you what you asked. I sustained the objection."

5. *Trial Court by its comments and unwarranted threats needlessly embarrassed and intimidated Casselman, thereby seriously inhibiting his effective defense of Petitioner: i.e.,*

(a) R.T. 871. Direct of Bubis. Court: "Are you testifying, Mr. Casselman, or is this man testifying?"

(b) R.T. 893. (Cross of Bubis) Trial Court took over in effect by cross-examination of *only* defense witness. Court: "Has that ever been the topic of conversation as between you and Mr. Smith?" Casselman: ". . . Object to that . . . as to time and place . . ." Court: "*We can't ask everything all at once, Mr. Casselman.*' (Emphasis added.)

(c) R.T. 907. Court (To Casselman): ". . . [W]hen I sustain an objection . . . I don't want the next question to come back with exactly the same question except in a different form . . . *Don't you ever do that again in this courtroom or you are going to end up in jail.* (Emphasis added.)

6. *Trial Court committed reversible error when it, in effect, told the jury to disregard the testimony of the only defense witness (Bubis): i.e.,*

(a) R.T. 876-877. Bubis direct. Court: "Mr. Casselman, I have already admonished you about repeating the testimony of witnesses. The jury has heard it. *I take it that, like the Court, it doesn't impress them to hear it a second time.*" (Emphasis added.)

The ultimate result of the Trial Court's open hostility and obvious bias was to impede Mr. Casselman in properly performing his duties as defense counsel, and had the further effect of unjustifiably prejudicing the jury against Petitioner. All of which created an at-

mosphere in which Petitioner could not, and did not, receive a Fair Trial.

Again the Ninth Circuit did not touch upon this issue in its opinion below, but merely stated that "other points raised we find insubstantial."

Again Petitioner urges that this is not an insubstantial issue and respectfully submits that the aforesaid bias and hostility of the Trial Court taken together with the prejudicial conduct of the prosecutor, were more than sufficient to deprive Petitioner of his right to a fair trial and due process.

C. There Was Insufficient Competent Evidence to Sustain Petitioner's Judgment of Conviction.

It is, of course, elemental that the Government must prove the *corpus delicti* of a crime before there can be a conviction. It is equally basic that the *corpus delicti* cannot be proven solely by the extra-judicial statements of a defendant made after the commission of the crime. There must be *substantial* independent evidence that a crime has been committed without looking to the defendant's extra-judicial statements. *Gay v. United States* (1969) 408 F.2d 923; *United States v. Echeles* (1955) 22 F.2d 144. The phrase "corpus delicti" includes first, the fact of an injury or a loss and secondly, the fact of somebody's criminality as to the cause of the injury or loss. *United States v. Echeles, supra.* It also generally means that a specific crime charged has actually been committed by someone. *Vote v. United States* (1946) 156 F.2d 308.

There must be sufficient competent evidence to sustain a judgment of conviction for violating 18 U.S.C. §§2314 and 2315; and if there is not, such a judgment

must be reversed. *United States v. Braico* (1970) 422 F.2d 543, cert. denied 398 U.S. 912.

In the instant case, it is submitted, there is insufficient competent evidence to sustain Petitioner's judgment of conviction.

(i) *There Was Insufficient Competent Evidence to Prove That the Stock Certificates in Question Had Been Stolen.*

All of the counts of the indictment refer to "stolen" stock certificates. *It necessarily follows that it was incumbent upon the Government to prove that the certificates were, in fact, stolen,* or its case must fall on this point alone and a jugdment of acquittal should be rendered. *No such evidence was ever introduced.*

To prove that the stock certificates were in fact stolen the Government called Roy Fildes, Janet Vincent, Barbara McLain, Saeed Behshid, William Guckes, William Thompson and Lawrence Sloan.

Roy Fildes only testified as to the dates of death of his mother and brother, Glen Fildes; the fact that sometime "prior" to his brother's death, his brother was in possession of "certain" stock certificates of Coca Cola Bottling Company, Farmers Underwriting, General Telephone and Telegraph and Truck Underwriters; that after his brother's death, he unsuccessfully searched for those stock certificates; and that the signatures on the reverse side of Exhibits 1, 2, 3 and 4 (stock certificates) were not his or his mother's.

Fildes was then asked the following question:

> "By Mr. Nissen: Q. Mr. Fildes, are you aware of any agreement, document or oral understanding by which these stocks could have come into the possession of Mr. *Tucker* or Mr. *Smith*?

Mr. LaRossa: Objection.

The Court: The objection is overruled. That is that, you signed it. (sic)

The Witness: No sir."

It is urged that the question itself is highly objectionable. It calls for a conclusion of the witness and calls for pure speculation. There was no foundation laid showing that the witness was entitled to make any such conclusion, and therefore, the objection should have been sustained.

However, whether the objection was sustained or not, it is really moot. The witness was never asked if he knew if there was any document or understanding by which the stock certificates could have come into the possession of Mr. *Ogul* or Mr. *Medlevine*. The question quoted above only referred to *Tucker* and *Smith*. *The witness was never asked if he knew how the certificates came into the possession of Ogul or Medlevine*. It is this possession that goes to the heart of the case, since the Government at all times argued to the jury that Ogul and Medlevine had stolen the stock.

Nor was he ever asked if Exhibits 1, 2, 3, and 4 were the *same stock certificates* that the witness was referring to when he was asked if his brother had "certain certificates" in his possession "prior" to his death. For all we know, they may have been totally different certificates. For all we know, Mr. Ogul or Mr. Medlevine may have come into possession of these certificates in a perfectly legitimate manner. There is certainly no evidence that either Ogul or Medlevine stole the stock certificates despite the opening statement of the Gov-

ernment to this effect, and the argument of the Government to the jury to this effect.

Janet Vincent merely testified to the fact that she was the attorney representing the Estate of Glen Fildes, made a search for "certain stock certificates" and failed to find them; wrote to the transfer agents and was informed that "these stocks" had been transferred.

Again, it must be noted that *she never identified any particular stock certificates.* She never identified Exhibits 1, 2, 3, or 4 as being in the possession of the decedent. She never testified that decedent had owned any particular stock or any stock at all. The essence of her testimony was simply that she participated in a search for "certain stock certificates", which certificates were never identified.

William Thompson merely testified that he participated in a search of Glen Fildes' (his cousin) house, car and effects and that he did not come across any stock certificates in that search.

Again, this witness never identified any certificates and the essence of his testimony was simply that he searched the house and car and found no certificates.

Barbara McLain, Saeed Behshid and William Guckes merely testified that they were transfer agents for the various stocks contained in Exhibits 1, 2, 3, and 4; and that they received said stocks in the ordinary course of their business as transfer agents.

Again, there was no testimony by any of these witnesses that the said stocks were stolen.

Laurence Sloan, the examiner of questioned documents merely testified that he had compared the sig-

nature of Mrs. Fildes and her two sons on the backs of "the various stock certificates" with the signatures on the check exemplars, which are Exhibits 6, 7 and 8. That the person who wrote the signature of Mr. Fildes on the reverse side of the stock certificates, Exhibits 1, 2 ,3, and 4, was not the maker of the check which is Exhibit 7. That the person who wrote Roy Fildes on Exhibits 1, 2, and 4, was not the same person who wrote the name on the checks in Exhibit 6. That the person who wrote the name Glen Fildes on Exhibits 1, 2, 3 and 4, is not the person who wrote the checks as maker in Exhibit 8. That it appeared that whoever wrote the signature of Glen Fildes on the "various stock certificates" appeared to have had at her or his disposition writing of Glen Fildes, and attempted to assume the general writing style and characteristics of Glen Fildes. That there was a great deal of similarity between the two groups of writings. That it did not appear that the person who wrote the Glen Fildes signature on Exhibit 8 is the same person who wrote the Mayme Fildes signatures on the exhibits which are contained in the stock certificates; that these were two different kinds of writing.

The foregoing testimony contains the entire effort by the Government to prove that the stock certificates were stolen. Therefore, not only was the record completely devoid of any evidence to show that the stock certificates, Exhibits 1, 2, 3 and 4, were stolen, but there wasn't even any proper identification that the stock certificates referred to by Roy Fildes were the certificates represented by Exhibits 1, 2, 3 and 4.

Absent such proof that the certificates were stolen, as alleged in the indictment, the entire case of the Government fails.

(ii) *There Was Insufficient Competent Evidence to Prove That There Was a Conspiracy and That Petitioner Participated Therein; or That in Fact Any Crime Had Been Committed.*

It was incumbent upon the jury to find from independent evidence (*i.e.* other than the extra-judicial statements of alleged co-conspirators) that there was a conspiracy and that Petitioner participated therein *prior* to its considering the extra-judicial statements of alleged co-conspirators.

In the instant case, if you eliminate the so-called statements or admissions of the alleged co-conspirators, you simply do not have any substantial independent evidence whatsoever as to the commission of any crime, including conspiracy.

In this connection, it should be noted that the Court charged the jury, *inter alia*, as follows:

> "The objects of the conspiracy were as follows: defendants would obtain securities which had been stolen . . ." [R.T. pp. 1037-1038.]

In addition, the other charges to the jury all had reference to "stolen' stock certificates, with reference to the crimes being charged against the defendants.

Certainly, no one could look at the evidence in this case and say that it showed beyond a reasonable doubt that any stock certificates had been *stolen*.

On page 1052, R.T. lines 12 through 15, the Court charged the jury as follows:

> "That is to say, the membership of the defendant, or any other person, in a conspiracy, must be established by the evidence in the case as to his own conduct, what he himself wilfully *said* or did."

It is to be noted that what, in effect, the Court is telling the jury here is that the jury could find the person was part of a conspiracy based upon what that particular person himself *said*. This completely ignores the rules set forth hereinabove that the *corpus delecti* of the crime of conspiracy must be proven by substantial independent evidence and cannot be proved solely by the extra-judicial statements of defendants.

On page 1060 of R.T., lines 3 through 7, the Court charged the jury as follows:

> "Unless otherwise instructed in determining the issue of the intent, the jury is entitled to consider *any statements made* and acts done or omitted by *the accused*, and all facts and circumstances in the case which may aid in determination of state of mind."

This instruction is extremely ambiguous and could only have caused confusion in the minds of the jury. The charge tells them they may consider any statements made by "the accused" which may very well mean the four individuals accused in the indictment.

Although the Court told the jury they could consider any of the statements made by any of "the accused", the Court failed to give any instruction as to how the testimony of an alleged accomplice should be considered and that it must be viewed with caution. The Court must instruct as to how accomplice testimony should be considered.

Butler v. U.S., 408 F.2d 1103 (C.A. Okl. 1969).

On page 1059 of the R.T. lines 21 through 22, the Court charged the jury as follows:

> "In considering the proof of intent, circumstantial evidence may be used."

However, the Court failed to instruct the jury that where a case is based upon circumstantial evidence, as in the instant case, the inferences to be drawn from the evidence must not only be consistent with guilt, but must be inconsistent with every reasonable hypothesis of innocence.

Fitzpatrick v. United States, 410 F.2d 513 (C.C. Ala. 1969);

Hale v. United States, 410 F.2d 147 (C.A. Ga. 1969).

In spite of Petitioner's foregoing argument, the Ninth Circuit Court of Appeals found that "[t]he evidence was abundant and the jury made no mistake." Petitioner believes that the Ninth Circuit erred in this determination and respectfully requests that this Honorable Court grant this Petition and review the decision of the Ninth Circuit Court of Appeals on this issue.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

August 13, 1971.

Respectfully submitted,

ARTHUR J. CROWLEY

Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff and Appellee, vs. Dalton Carl Smith, Appellant. No. 71-1389.

On Appeal from the United States District Court for the Central District of California.

Filed: July 20, 1971.

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and SCHWARTZ, district judge.

Per curiam:

The conviction in this case involving stolen and forged securities is affirmed.

It is said there should have been a severance of the substantive and conspiracy counts. No motion for a severance is in the record.

There is a point about Bruton v. United States, 391 U.S. 123. This is not a Bruton case. United States v. Griffin (9 Cir., 1970), 434 F.2d 978, is applicable.

Objection is made that when certain statements of co-conspirators were admitted in evidence the conspiracy hadn't been proved. In this case we find this to be only a question of order of proof within the trial court's discretion. See United States v. Knight (9 Cir. 1969), 416 F.2d 1181.

There is no merit to the contention that there was insufficient evidence. The evidence was abundant and the jury made no mistake.

Other points raised we find insubstantial.

The mandate will issue now.

APPENDIX B.

Judgment and Commitment of the District Court.

United States District Court, for the Central District of California.

United States of America v. Dalton Carl Smith. No. 6573-Criminal.

On this 1st day of March, 1971 came the attorney for the government and the defendant appeared in person by his retained counsel, Arthur Crowley.

It Is Adjudged that the defendant upon his plea of Not Guilty and verdicts of guilty, has been convicted of the offenses of Conspiracy, in violation of 18 USC §371, as charged in Count 1 of the indictment; Interstate Transportation and Receiving of Stolen and Forged Securities, in violation of 18 USC §2314, as charged in Counts 2, 13, 14, 15, 16, 17, 18, 19, and 20 of the indictment; and Sale or Receipt of Stolen Goods, in violation of 18 USC §2315, as charged in Counts 5, 6, 7, 8, 9, 10, 11, and 12 of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the maximum period authorized by law and for study pursuant to 18 USC §4208(c), the results of such study to be furnished this Court within 3 months or any additional time granted by the Court, whereupon the de-

fendant shall be returned to this Court and the sentence of imprisonment herein imposed shall be subject to modification, pursuant to 18 USC §4208(b).

It Is Adjudged that the sentence herein imposed is imposed on each of Counts 1, 2 and 5 through 20, such sentence to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Manuel L. Real
MANUEL L. REAL,
United States District Judge
/s/ David M. Homsy
By David M. Homsy

Filed: March 1, 1971.
Emory G. Hatcher, Clerk.